No. 50136-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Charles Paschal,

Appellant.

Clark County Superior Court Cause No. 13-1-00502-6

The Honorable Judge Suzan Clark

Appellant's Opening Brief

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1. The sentencing court violated Mr. Paschal's Fourteenth Amendment right to due process.
2. The sentencing court violated the appearance of fairness doctrine and CJC 2.11(A).
3. The sentencing court vindictively imposed 30 years in prison following the Court of Appeals' remand.

> **ISSUE 1:** A judge violates the appearance of fairness doctrine when there is some evidence of potential bias. Did the sentencing court violate the appearance of fairness doctrine by imposing a 30-year prison term following Mr. Paschal's successful appeal and the dismissal of a violent sex offense?
>
> **ISSUE 2:** Imposition of a "more severe sentence" following a successful appeal creates a presumption of unconstitutional vindictive sentencing. Is Mr. Paschal's 30-year sentence equivalent to a "more severe sentence," given that the sentencing court imposed the same overall sentence despite the reversal of the first-degree rape charge?
>
> **ISSUE 3:** The vindictive sentencing presumption may only be rebutted by evidence in the record establishing the reasons for the "more severe sentence." Does the unrebutted presumption of vindictive sentencing violate Mr. Paschal's Fourteenth Amendment right to due process, requiring reversal and remand for resentencing before a different judge?

4. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

> **ISSUE 4:** If the State substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Charles Paschal is indigent, as noted in the Order of Indigency?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Kim Martin claimed her partner Charles Paschal assaulted her over several hours on March 16, 2013. CP 3-4. Her allegations led to charges of assault 1, unlawful imprisonment, two counts of assault 2, and rape 1. CP 3-5. A jury convicted Mr. Paschal, and endorsed two aggravating factors: that the offense was domestic violence, and that it occurred within the sight or sound of minor children. CP 11; Judgment and Sentence filed 8/18/14, Supp. CP.

Finding that the assaults all merged with one another, the court vacated both assault 2 convictions. CP 11. The standard range for the assault conviction, including the point added from the rape, was 90 to 123 months. Judgment and Sentence filed 8/18/14, Supp. CP. The court issued an exceptional sentence of 360 months. Judgment and Sentence filed 8/18/14, Supp. CP.

Mr. Paschal appealed. CP 3. The Court of Appeals reversed the sex offense, holding the trial court committed prejudicial error when it allowed the jury to hear inadmissible evidence. CP 3-30. The matter was remanded. CP 30.

The trial court vacated the sex offense conviction. CP 31. The State declined to retry Mr. Paschal on the sex offense but argued for the same sentence, despite the dismissal of the violent sex offense. RP 4-11.

The trial judge gave the same sentence, 360 months, explaining: "[M]y feelings the day that I sentenced you originally are the same today, that the 360-month sentence is appropriate." RP 16-17.

Mr. Paschal timely appealed. CP 48.

ARGUMENT

I. THE TRIAL JUDGE ACTED VINDICTIVELY AND VIOLATED THE APPEARANCE OF FAIRNESS BY IMPOSING A THIRTY-YEAR PRISON SENTENCE AFTER MR. PASCHAL SUCCESSFULLY CHALLENGED HIS CONVICTION FOR FIRST-DEGREE RAPE.

A. This court should review Mr. Paschal's claims *de novo.*

Mr. Paschal raises a constitutional violation and an appearance of fairness claim. Courts review such arguments *de novo*.[1] *King Cty. v. Vinci Constr. Grands Projets/Parsons RCI/Frontier-Kemper, JV*, --- Wn.2d ---, ___, 398 P3d 1093 (Wash. July 6, 2017); *State v. Armstrong*, 188 Wn.2d 333, 339, 394 P.3d 373 (2017); *In re Disciplinary Proceeding Against King*, 168 Wn.2d 888, 899, 232 P.3d 1095 (2010).

However, the Supreme Court has issued conflicting opinions on the proper standard of review of discretionary decisions violating an accused person's constitutional rights. The better approach is to review *de*

[1] This is so even though courts ordinarily review challenges to the length of an exceptional sentence for an abuse of discretion. *See, e.g., State v. Branch*, 129 Wn.2d 635, 649, 919 P.2d 1228 (1996).

novo a trial court's discretionary decisions that infringe constitutional rights.

The Supreme Court has applied the *de novo* standard to discretionary decisions that would otherwise be reviewed for abuse of discretion. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576, 579 (2010); *State v. Iniguez*, 167 Wn.2d 273, 281, 217 P.3d 768 (2009). In *Jones,* for example, the court reviewed *de novo* a discretionary decision excluding evidence under the rape shield statute because the defendant argued a violation of his constitutional right to present a defense. *Jones,* 168 Wn.2d at 719.[2] Similarly, the *Iniguez* court reviewed *de novo* the trial judge's discretionary decisions denying a severance motion and granting a continuance because the defendant argued a violation of his constitutional right to a speedy trial. *Iniguez*, 167 Wn.2d at 280-281. The *Iniguez* court specifically pointed out that review would have been for abuse of discretion had the defendant not argued a constitutional violation. *Id*.

But the court has not applied this rule consistently. For example, one month prior to its decision in *Jones* , the court apparently applied an abuse-of-discretion standard to questions of admissibility under the rape shield law, even though—as in *Jones*— the defendant alleged a violation

[2] Generally, the exclusion of evidence under that statute is reviewed for an abuse of discretion. *State v. Posey*, 161 Wn.2d 638, 648, 167 P.3d 560 (2007).

of his right to present a defense. *State v. Aguirre*, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010).

This inconsistency should not be taken as a repudiation of *Jones* and *Iniguez.* Cases applying the abuse-of-discretion standard have not grappled with the reasoning outlined by the *Jones* and *Iniguez* courts. *See, e.g.*, *State v. Dye*, 178 Wn.2d 541, 309 P.3d 1192 (2013); *State v. Clark*, 187 Wn.2d 641, 648–49, 389 P.3d 462 (2017) .

In *Dye*, the court indicated "[a]lleging that a ruling violated the defendant's right to a fair trial does not change the standard of review." *Id.*, at 548. However, the *Dye* court did not cite *Iniguez* or *Jones. Id.*, at 548. Nor did it address the reasoning outlined in those decisions. Furthermore, the petitioners in *Dye* did not ask the court to apply a *de novo* standard. *See Dye* Petition for Review[3] and Supplemental Brief.[4] As the *Dye* court noted, the petitioner "present[ed] no reason for us to depart from [an abuse-of-discretion standard]." *Id.*[5] There is no indication that the *Dye* court intended to overrule *Iniguez* and *Jones*. *Id.*

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[3] Available at http://www.courts.wa.gov/content/Briefs/A08/879290%20prv.pdf (last accessed 7/11/17).

[4] Available at http://www.courts.wa.gov/content/Briefs/A08/879290%20petitioner's%20supplemental%20brief.pdf (last accessed 7/11/17).

[5] By contrast, the Respondent did argue for application of an abuse-of-discretion standard. *See Dye,* Respondent's Supplemental Brief, pp 8-9, 17-18, available at http://www.courts.wa.gov/content/Briefs/A08/879290%20respondent's%20supplemental%20brief.pdf (last accessed 7/11/17).

In *Clark*, the court announced it would "review the trial court's evidentiary rulings for abuse of discretion and defer to those rulings unless no reasonable person would take the view adopted by the trial court." *Id.* (internal quotation marks and citations omitted). Upon finding that the lower court had excluded "relevant defense evidence," the reviewing court would then "determine as a matter of law whether the exclusion violated the constitutional right to present a defense." *Id.*

Although the *Clark* court cited *Jones*, it did not suggest that *Jones* was incorrect, harmful, or problematic, and did not overrule it. *See, e.g.*, *Armstrong*, 188 Wn.2d at 340 n.2 ("For this court to reject our previous holdings, the party seeking that rejection must show that the established rule is incorrect and harmful or a prior decision is so problematic that we must reject it").

The *Clark* court did not even acknowledge its deviation from the standard applied by the *Jones* court. *Id.* Nor does the *Clark* opinion mention *Iniguez.* Furthermore, as in *Dye*, the Respondent in *Clark* argued for the abuse-of-discretion standard, and Petitioner did not ask the court to apply a different standard. *See* Respondent's Supplemental Brief, p. 16;[6]

[6] Available at http://www.courts.wa.gov/content/Briefs/A08/92021-4%20Supp%20Brief%20-%20Resp.pdf (last accessed 2/10/17).

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Petitioner's Supplemental Brief.[7]

This court should follow the reasoning in *Iniguez* and *Jones*. This is especially true given the absence of any briefing addressing the appropriate standard of review in *Dye* and *Clark.*

Constitutional errors should be reviewed *de novo. Jones,* 168 Wn.2d at 719; *Iniguez,* 167 Wn.2d at 281. This rule encompasses discretionary decisions that violate constitutional rights. Mr. Paschal does not argue that his exceptional sentence is "clearly excessive;" thus, the abuse of discretion standard normally applicable to such challenges does not apply. *See Branch,* 129 Wn.2d at 649. Furthermore, even if the issues were subject to discretionary review, his constitutional claims merit *de novo* review. *Jones*, 168 Wn.2d at 719.

Jones and *Iniguez* set forth the proper standard. Given the Supreme Court's inconsistency on this issue, review here should be *de novo. Id.; Iniguez*, 167 Wn.2d at 281.

B. The thirty-year sentence was imposed vindictively in violation of due process and the appearance of fairness.

Due process secures the right to a fair tribunal. *Bracy v. Gramley,* 520 U.S. 899, 904, 117 S.Ct. 1793, 138 L. Ed. 2d 97 (1997). Indeed, "to

[7] Available at http://www.courts.wa.gov/content/Briefs/A08/92021-4%20Supp%20Brief%20-%20Pet'r.pdf (last accessed 2/10/17).

perform its high function in the best way 'justice must satisfy the appearance of justice.'" *In re Murchison,* 349 U.S. 133, 36, 75 S. Ct. 623, 99 L. Ed. 942 (1955) (quoting *Offutt v. United States*, 348 U.S. 11, 14, 75 S. Ct. 11, 99 L. Ed. 11 (1954)). In other words, "[t]he law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial." *State v. Madry*, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972). This is so because "[t]he appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of bias or prejudice." *Id., at* 70; *Brister v. Tacoma City Council*, 27 Wn. App. 474, 486, 619 P.2d 982 (1980), *review denied*, 95 Wn.2d 1006 (1981).

A decision may be challenged under the appearance of fairness doctrine for "partiality evidencing a personal bias or personal prejudice signifying an attitude for or against a party." *Buell v. City of Bremerton*, 80 Wn.2d 518, 524, 495 P.2d 1358 (1972), *quoted with approval in OPAL v. Adams County*, 128 Wn.2d 869, 890, 913 P.2d 793 (1996).

To prevail, a claimant must only provide "some evidence of the judge's… potential bias." *State v. Dugan,* 96 Wn. App. 346, 354, 979 P.2d 85 (1999). The appearance of fairness doctrine can be violated without any question as to the judge's integrity. *See, e.g., Dimmel v. Campbell*, 68 Wn.2d 697, 414 P.2d 1022 (1966).

Under the "appearance of fairness" doctrine, proceedings are invalid unless "a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial, and neutral hearing." *State v. Solis-Diaz*, 187 Wn.2d 535, 540, 387 P.3d 703 (2017). The doctrine is violated upon a showing of "potential bias." *Id.* The test is an objective one, which contemplates "a reasonable observer [who] knows and understands all the relevant facts." *Id.*[8]

Washington's Code of Judicial Conduct (CJC) echoes these principles. The CJC directs Judges to avoid "both impropriety and the appearance of impropriety." CJC, Preamble. A judge must disqualify himself or herself "in any proceeding in which the judge's impartiality might reasonably be questioned." CJC 2.11(A).[9]

The constitutional prohibition against vindictive sentencing is a subset of the appearance of fairness doctrine. Due process prohibits sentencing courts from punishing offenders who have successfully appealed by vindictively imposing a "more severe sentence." U.S. Const. Amend. XIV; *North Carolina v. Pearce*, 395 U.S. 711, 725, 726, 89 S. Ct.

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[8] Similarly, due process requires "disqualification of a judge… whose impartiality may be reasonably questioned." *In re Welfare of R.S.G.*, 174 Wn. App. 410, 430, 299 P.3d 26 (2013).

[9] A nonexclusive list of situations requiring disqualification includes circumstances where the judge knows that he or she is "a party to the proceeding, or… [a] managing member… of a party." CJC 2.11(A)(2)(b).

2072, 2080, 23 L. Ed. 2d 656 (U.S. 1969), *overruled in part by Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). Not only must a sentencing judge refrain from vindictiveness; defendants must also be "freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." *Id.*

To protect against this apprehension, due process requires an affirmative showing in the record justifying any increase in the sentence imposed following a successful appeal. *Id.*, at 726. Facts supporting the increased sentence "must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." *Id.*

Pearce created "a presumption of vindictiveness, which may be overcome only by objective information in the record justifying the increased sentence." *U. S. v. Goodwin*, 457 U.S. 368, 374, 102 S. Ct. 2485, 2489, 73 L. Ed. 2d 74 (1982). The presumption is a prophylactic measure "to prevent actual vindictiveness from entering into a decision and allay any fear on the part of a defendant that an increased sentence is in fact that the product of vindictiveness." *Wasman v. United States*, 468 U.S. 559, 564–65, 104 S. Ct. 3217, 82 L. Ed. 2d 424 (1984).[10]

[10] Subsequent cases have clarified that the "presumption of vindictiveness 'do[es] not apply in every case where a convicted defendant receives a higher sentence on retrial.'" *Smith*, 490
(Continued)

Here, there is "some evidence" of potential bias. *Dugan,* 96 Wn.App. at 354. The sentence imposed here is analogous to the "more severe sentence" referred to by the Supreme Court in *Pearce*. *Pearce,* 395 U.S. at 726.

Originally, Mr. Paschal received a total of 30 years in prison for three crimes, including two serious violent offenses (first-degree assault and first-degree rape). Judgment and Sentence filed 8/18/14, p. 4, Supp. CP. Following his successful appeal and the dismissal of the violent sex offense, he was sentenced for only two felonies. CP 32, 35.

However, even in the absence of the rape conviction, the court ordered the same 30-year prison term. CP 35. Under these circumstances, imposition of the same 30-year term is equivalent to a "more severe sentence." *Id.*

This "more severe sentence" following Mr. Paschal's successful appeal creates a presumption of vindictiveness. *Id.; Goodwin,* 457 U.S. at 374. Furthermore, the presumption is unrebutted. There is no "objective information in the record justifying [imposition of the same 30-year] sentence." *Goodwin*, 457 U.S. at 374. Instead, the sentencing judge provided only his subjective opinion: "[M]y feelings the day that I

U.S. at 799 (quoting *Texas v. McCullough*, 475 U.S. 134, 138, 106 S. Ct. 976, 89 L. Ed. 2d 104 (1986)).

sentenced you originally are the same today, that the 360-month sentence is appropriate." RP 16-17.

This violated *Pearce*, the appearance of fairness doctrine, and the Code of Judicial Conduct. *Pearce*, 395 U.S. at 725-726; *Solis-Diaz*, 187 Wn.2d at 540; CJC 2.11(A). The sentence must be vacated and the case remanded for resentencing before a different judge. *Solis-Diaz*, 187 Wn.2d at 541.

II. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD APPELLATE COSTS.

The Court of Appeals should decline to award appellate costs because Charles Paschal "does not have the current or likely future ability to pay such costs." RAP 14.2. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court's discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). The trial court found Charles Paschal indigent and indicated he would not be able to pay any discretionary legal financial obligations. CP 35, 66. That status is unlikely to change, especially with the imposition of a 30-year prison term. CP 35. The *Blazina* court indicated that courts should "seriously question" the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839.

If the State substantially prevails on this appeal, this court should deny any appellate costs requested. RAP 14.2.

CONCLUSION

Mr. Paschal's sentence must be vacated and the case remanded for a new sentencing hearing before a different judge. In the alternative, if the State substantially prevails, the court should decline to impose appellate costs.

Respectfully submitted on August 23, 2017,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on August 23, 2017.

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August 23, 2017 - 11:38 AM

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Appellate Court Case Title:	State of Washington, Respondent v. Charles E. Paschal, Appellant
Superior Court Case Number:	13-1-00502-6

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